

Department Does Matter: A review of Battered Women in the Courtroom: The Power of Judicial Response by James Ptacek

By Andrea D. Lyon¹

*“ Ms. X, I want you to know that I am not just finding you not guilty here. There is no question in my mind that you are the victim, not your husband. If you were to look at the “wheel of control” that the battered women’s shelter here hands out, every characteristic which describes a batterer totally fits your husband. In fact, they could just put his picture right here in the center of it. You are not guilty Ms. X, you did nothing wrong.”*²

When the Michigan Clinical Law Program students who tried Ms. X’s case won the acquittal for our client, she was very happy. Not only was she happy to have been acquitted of the domestic violence charge, but it mattered to her, deeply, that the trial judge *believed* her, when the police had not. It mattered to her immeasurably that the trial judge saw her not just as not guilty, but as wrongly

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² Finding of Judge John B. Collins, district judge in Ypsilanti Michigan District Court 14B, acquitting Ms. X of domestic violence. She had been charged as the only defendant despite the fact that her husband had been abusing her for years, and she finally had stopped calling the police after they would not prosecute a spousal rape. Ms. X was represented by the Michigan Clinical Law Program, and two of the authors students tried her case, including finding and presenting expert testimony that she was a battered woman. The remarks above are a portion of what Judge Collins said to our client as he acquitted her.

accused.³

It is this essential truth that James Ptacek illustrates so well in his book; how important the words and demeanor of a judge are especially in circumstances of emotional turmoil like domestic violence. This may seem like an axiomatic truth; of *course* how a judge behaves, how she carries herself, how she speaks matters. However common sense this may seem, it is not something that the judicial system pays much attention to. When various bar associations evaluate judges who are running for election or retention they may ask about “judicial temperament”, but what does that really mean?

Unfortunately, though, this book does both more and less than it ought to. Because it attempts to speak to a lot of issues Ptacek is ill-equipped or inclined to handle in depth, it fails as a cohesive book. This is a shame because the insights that it does have, are really worth reading, especially if this book is directed at the judiciary.

The first half of the book is an overview of domestic violence, its history, problems of economics and race and gendered politics. While it is good to introduce the subject, and not to ignore such pernicious issues as race, the first four chapters of this book should have been either more or less. That is, either these subjects should have been dealt with in more depth and with some support, or there should have been one chapter to introduce the parameters of the problem and then move to the reason for writing this book. For example, while Ptacek is brave enough to brace the issue of race and how racism impacts on the issues of domestic violence, his conclusion that women of color are less likely to call the police because of fear of mistreatment by the police⁴ is belied by his own data showing that the largely white population of the Quincy court were less likely to call the police than the largely minority population emanating from the Dorchester courthouse.⁵ This is not to denigrate the fact that Ptacek is willing to talk about race and class, the politics of ignoring their impact and the politics of speaking about it too.

One problem that is not addressed in this book, though, is Ptacek’s immediate assumption that all of testimony and statements supporting the requests for orders of protection were true, and that there was no such thing as an “innocent” respondent. There is no place in Ptacek’s world for the presumption of innocence. In fact he says so when he calls it “evil” to think that a woman *might* lie about these issues.⁶ While it is important that the presumption in a hearing on a request for a protective order go to the person requesting it (at least temporarily), the fact that a judge or other official considers it possible that the system might be used manipulatively does not make her sexist or insensitive. One of

³ Ms. X has occasionally been in touch with me since that acquittal -- she is divorced now, finishing school (which her husband had not wanted her to attend) and working. She has commented that the judge’s remarks made her understand that she wasn’t a bad person, that remembering that has “kept her going.”

⁴ Ptacek, James. Battered Women in the Courtroom: The Power of Judicial Response. Northeastern University Press, Boston, Massachusetts.1999 at p. 13, 14.

⁵ *Id.* At p. 144 -- women from Dorchester had called the police prior to seeking a restraining order 90% of the time, those from Quincy 65% of the time.

⁶ *Id.* at p.70

the most difficult things about being a judge is to be prepared to believe and disbelieve at the same time; that is to truly be willing to cast aside presumptions and prejudices that we all carry with us.

What Ptacek does extremely well though appear in the heart of the work he has done contained primarily in chapters five through eight -- the second half of the book. In those chapters Ptacek compares what a judge actually does in response to requests for protective orders with what he or she *appears* to be doing in the context of hearing domestic violence restraining order requests⁷. While most judges are inclined to grant protection orders, at least temporarily, it isn't just what they do but how they do it that matters. And this is the central, and very important message of this book.

The public in Massachusetts became interested in the area of judicial demeanor as a result of the Nigro case. In March of 1986 Pamela Dunn Nigro went to court to get a restraining order against her husband, only six weeks after her wedding, telling the court that she felt a prisoner in her own home, that her husband was choking her and had threatened to kill her should she ever leave him.⁸ While Judge Paul P. Hefferman did grant her a restraining order, he was demeaning to her when she later came into court asking for a police officer to escort her to her apartment so she could gather her things. Her husband was in court when Judge Hefferman chastised her, telling her that the court essentially had better things to do, that the matter was "trivial" and that Mrs. Nigro should "act like an adult."⁹ The judge even chastised both the district attorney's office representative and the police officer (who was willing to go with her) telling them that they had heard the judge tell "this lady she didn't need the police."¹⁰

Five months later, Pamela Dunn Nigro was brutally murdered by her husband -- shot, stabbed and strangled.¹¹ This case became the cause celebre of many women, and front page news when the treatment of Mrs. Nigro by Judge Hefferman became known. According to Ptacek, this murder had a "profound impact on feminist organizing in Massachusetts. It spurred efforts to train advocates to assist battered women in the courts, and women's shelters, law schools, undergraduate colleges and law firms have worked to place advocates in every courthouse in the stat. In the wake of this murder, community

⁷ The need to appear to be doing justice in addition to actually doing justice has been commented upon by many in other contexts, for example the dissonance between *doing* justice in the courtroom with all of the chaos and confusion that surrounds the workings of a busy city criminal court, and appearing to do justice under those circumstances to the outsider . Silberman, Charles, Criminal Violence, Criminal Justice, Random House: New York, 1978, Chapter 8 at page 255.

⁸ Ptacek at p. 8.

⁹ *Id.* at pp. 4, 5

¹⁰ *Id.* at p.5

¹¹ *Id.* at p. p. 5. Her husband was convicted of first degree murder and sentenced to life without parole.

activists pressured the state to examine judicial misconduct and gender bias in the courts.”¹² Although Ptacek doesn't say so, it appears that this public interest spurred his interest into the area as well.

Ptacek did his research in two courts in the Boston area. He deliberately chose two district courts near Boston that were economically and racially different. The Dorchester District Court serves a “largely African American and Latina and Latino population, the court in Quincy serves a largely Anglo-American population.”¹³ This is one of the things that shows the thoughtfulness of Ptacek's actual work -- intuitively he thought that treatment would be different of minority women, but he checked it out. And he was right.

Ptacek observed the in-court behavior of eighteen different judges, twelve white men, four white women and two African American men in 147 cases seen in a nine month period between 1992 and 1993.¹⁴ Ptacek also interviewed eight judges -- four from the two courts he observed and four from other courts in Massachusetts in 1992-1994, conducted telephone interviews with 40 women who had sought orders of protection in 1992 (half from the Dorchester court, half from Quincy court) and looked at a random sampling of 100 domestic violence case files in 1992.¹⁵

Without denigrating the important observations which Ptacek makes in this book, herein lies one of the problems with this book -- sample size. It is just too small, particularly the interviews with judges and the women who sought orders of protection. While there certainly are difficulties involved in interviewing the women who sought orders of protection, a sample of only eight judges is insufficient on its face. It also appear odd that the random sampling didn't track or follow the 147 observed cases -- it should have been possible to correlate the observed demeanor in the courtroom with some of those women's impressions as well as some of those same judges' reactions to the issues raised. There is a cohesiveness lost by this choice of method that might have been obviated had there been a coordination of observation, interview, file review and interview with the relevant judges.

In chapter five, Ptacek reports about his observations of judicial demeanor. What is most impressive about this is that he gives the reader a way to think about this ephemeral yet important subject, using the work of Maureen Mileski to create a typology of demeanor.¹⁶ One finds oneself saying “ah!” a lot of the time as the observation resonates with experience.¹⁷

¹² *Id.* at pp. 5, 6.

¹³ *Id.* at 185.

¹⁴ *Id.* p. 97 and 186. Ptacek was quick to note that these judges were “actually more balanced in terms of gender and race than the Massachusetts judiciary. At the time the observations were done, district court judges were 86 percent male, and 94 percent white in a state where people of color constitute 12 percent of the population.” *Id.* at p. 97

¹⁵ *Id.* at pp. 186-188.

¹⁶ *Id.* at 98

¹⁷ I gave a copy of this book to a judge whom I respect. The judge's response was immediate -- she thought the book, and particularly this part of it highly useful for judges to read. She is passing it

Ptacek divides the judges' demeanor towards women seeking orders of protection into five categories; good natured, bureaucratic, firm or formal, condescending, and harsh demeanor.¹⁸ He uses three categories to describe judicial demeanor towards men appearing as defendants; firm or formal, bureaucratic and good natured.¹⁹

For example, the judges who fell into the good natured demeanor category were judges who exhibited a courteous and affable demeanor to make "women feel at home in the court, to express concern for their suffering, and to mobilize resources on their behalf."²⁰ Ptacek then goes on to describe, in concrete and revealing detail the kinds of things these judges would do in this context such as to make certain the woman understood the process, that she hadn't anything she would like to add to the affidavit, etc. The message being given by judges who exhibited this demeanor was that the request was being taken seriously.

The other demeanors are described with equal attention to detail and example, and are very instructive to judges, and probably to lay persons as well. It is useful to have a language with which to speak about the behavior of judges in assessing them for reelection for example.

In chapter six, Ptacek examines the judge's perspective by interviewing eight judges. While some of the observations made about how judges view their roles was interesting from an anecdotal point of view, again the size of the sample in comparison with the space allotted to it in the book seemed out of proportion. Ptacek is candid about the fact that "seven of these judges have assumed a high profile on the issue of domestic violence.....[and] are not typical of the judiciary as a whole, they are not even representative of the other judges in their courts."²¹

Some of what the judges say about how they see what they do is interesting, especially from an advocate's point of view. Ptacek, though, seems to be unable to appreciate some of the judges' concerns with creating an atmosphere in which a battered woman can come and be heard (which Ptacek approves of) and that the judge be fair to the man, which Ptacek does not approve of. He views even *hearing* the man's "...concern for men's visitation rights -- something that [the judge] admits defendants are not entitled to at a hearing on a complaint initiated by a woman. This empathy for defendants which may arise from sharing "the man's point of view", as he puts it, seems to conflict with his initial remarks about the seriousness of the violence."²² Why is that true? Why is any expression of understanding of the emotional nature of these events to both parties a lessening of concern regarding violence? Every judge interviewed by Ptacek indicated that their first concern was the safety of the complainant, the fact that they do not presume a total lack of humanity on the part of

around the courthouse in which she works to judges who hear these kinds of cases.

¹⁸ Ptacek at pp. 98-104

¹⁹ *Id.* at pp. 105-110

²⁰ *Id.* at p.99

²¹ *Id.* at p. 113.

²² *Id.* at p. 124

the accused is to be lauded, not condemned. This is where Ptacek's analysis is consistently faulty. He does not even think that any complaining witness could or would lie to the court about domestic violence. While it is probably not a common occurrence that they would lie, or exaggerate, it is not impossible either. There is no room in Ptacek's view of things for a presumption of innocence. While a protective order is not a finding of criminal guilt, the consequences are enormous. The accused is often told to leave his (or her) home, not allowed to see his (or her) children, and there are financial consequences as well. This does not mean that there *shouldn't* be these consequences, but that a judge should be concerned about both sides of a controversy in his or her courtroom does not make the judge "patriarchal, just fair.

a courtroom should not be so intimidating that a battered woman would be afraid to come forward to complain, nor should it be biased against women, or trivialize her experiences, fear and concerns. But neither is a courtroom supposed to be a therapeutic forum, it is a court of law, there to resolve controversies, to mete out justice, and to do so with an accessible but serious demeanor. To suggest that a judge should not appear to be the authority figure he or she appears to be is to diminish one of the reasons that there is a court to hear these matters in the first

In Chapter seven, Ptacek presents some of his most interesting material -- the perceptions of the women appearing in these courts. Forty women were interviewed by telephone, and these names and numbers were gleaned from court records. What court records, Ptacek doesn't specify, but there is no indication that these forty interviews were coordinated in any way with any of the observed cases which is too bad. It would have been better to follow up on the cases that Ptacek actually observed in court so that Ptacek could then have compared what he observed with what the participants observed. Indeed it would have been interesting to see what the defendants in these actions saw as well.

Nonetheless, the women interviewed seemed to feel that judges were listening to them, some reported the importance of the judge looking them in the eye²³ and appearing to see them clearly. The demeanor of the judge was commented upon, more in the negative than the positive -- that is good demeanor made a stressful and frightening experience a little less so, but "bad" demeanor, made it really awful. This is unsurprising -- when a person is in an emotional state, it is hard to see past that, unless it is to see more of it. Most women reported that the men repeated the abuse, but felt going to court was the right thing to do anyway.²⁴ This is an interesting finding, since the purpose of getting the restraining order is to protect the woman from further abuse. "Overall the great majority of women felt they had made the right decision in going to court for restraining orders. The leverage they were able to gain through the threat of criminal sanctions was seen as beneficial; for many women, standing p for their rights offered its own rewards."²⁵

There are two important ideas judges can learn from this information and this chapter; being heard is important and taking an action, even if it doesn't "solve" the complaining witness's problem, Matter.

In Chapter Eight, Ptacek makes various suggestions about ways to improve judicial demeanor

²³ *Id.* at p. 153

²⁴ *Id.* at p. 167

²⁵ *Id.*

and respect for the courts. Of course, part of the point of this book is to make judges aware that they have a judicial and definable demeanor and that it changes how they are perceived as judges, as dispensers of justice. Ptacek suggest that both internal and external changes should occur -- internal by making more resources available to help battered women, and by some training and responsibility among judges for how the courts treat battered women. The external suggestion is more problematic; Ptacek suggests that the judge should understand that the “eye of the public” is upon him or her in this regard. While it is important that courtrooms and how battered women are treated in them be a part of public discussion, Ptacek’s last paragraph almost reads like a call for a retreat from what little independence remains to an elected judiciary, since most judges hearing these cases are elected.

This is worrisome because of the poor history this country has in regard to stomping on judicial independence, for example in the death penalty arena, whole campaigns have been run on how many executions a judge has been responsible for²⁶. It is difficult to imagine that it would any more helpful to have a system biased against men than it was to have one that is biased against women. What the women Ptacek talked to said, quite directly was that they wished to be heard and seen as individuals, not to be patronized or treated with hostility. We should be willing to actually listen to that message, and not encourage the judiciary to be even more susceptible to what it believes “the public” wants than it already is.

This book is definitely worth reading, especially for judges, advocates, lawyers and police mediators who deal directly with battered women. Judicial deportment does matter. We must not only do justice, but show the public that is what we are doing.

²⁶ Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 760 (1995) See also Harris v. Alabama, 513 U.S. 504, at 521, 115 S. Ct. 1031, at 1039 (1995) (Justice Stevens dissenting) “Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty. This has long been the case,] and the recent experience of judicial overrides confirms it. Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared.” (Footnote omitted)